Filed 11/7/16 In re K.C. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.C. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.C., Defendant and Appellant.	E066371 (Super.Ct.Nos. J219519 & J221115) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Dawn M. Messer, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court denied the Welfare and Institutions Code[1] section 388 request to change a court order of defendant and appellant L.C. (Mother). Mother contends: (1) the juvenile court erred by summarily denying her request; (2) the summary denial violated her right of due process; and (3) the juvenile court impermissibly delegated its authority to Mother's children. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. K.C.'s Detention

Mother began abusing methamphetamine at age 12. On January 30, 2008, San Bernardino County Sheriff's Deputies went to a house due to reports of a parolee being armed and dangerous. Mother was at the house, along with other adults. Mother was under the influence of methamphetamine. Mother was arrested. Mother was too incoherent to give deputies information about family members. As a result, Mother's two-month-old daughter, K.C., was detained by San Bernardino County Children and Family Services (the Department). K.C. appeared ill and small for her age.

Shortly thereafter, the Department discovered Mother had a son, M.N., who had been residing with his paternal grandfather (Grandfather) and step-grandmother (collectively, Grandparents) since he was three months old. M.N. was born in May 2006, so he was approximately 20 months old. Because M.N. was in Grandparents' custody, the Department did not detain him. The Department placed K.C. in the home of K.C.'s maternal great-uncle (Uncle) and great-aunt (Aunt).

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[1] All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

B. K.C.'S JURISDICTION

Mother's off-and-on boyfriend of four years, N.N. (Boyfriend), was the father of M.N. Mother resided with Boyfriend. Boyfriend was arrested, along with Mother, on January 30, 2008. Boyfriend was also a drug addict. Boyfriend was named as the father on K.C.'s birth certificate.

E.A.'s mother (Grandmother), contacted the Department. Grandmother explained her son, E.A. (Father), was K.C.'s father. Grandmother provided the Department with genetic test results showing the relationship. Grandmother said she had been visiting K.C. since K.C.'s birth. Father was in prison in New Mexico.

On February 25, 2008, the juvenile court found the following allegations to be true: (1) Mother's substance abuse interfered with her ability to provide adequate care for K.C. (§ 300, subd. (b)); (2) Boyfriend's substance abuse interfered with his ability to provide adequate care for K.C. (§ 300, subd. (b)); (3) Father knew or reasonably should have known that Mother has a substance abuse problem that interfered with her ability to provide adequate care for K.C. (§ 300, subd. (b)); and (4) Father's whereabouts and ability to parent K.C. are unknown (§ 300, subd. (g)). The court ordered a minimum of two supervised visits per week between K.C. and Mother.

C. K.C.'S DETENTION AND JURISDICTION

On April 23, the Department discovered Grandfather had a 2003 criminal conviction for contributing to the delinquency of a minor. As a result of Grandfather's conviction and the true findings against Mother and Boyfriend, the Department detained M.N. Boyfriend informed the Department he moved to Las Vegas to "'get away from

the temptation of using meth," and to "get away from . . . mother . . . so that they both would be able to focus on their services."

On May 21, the juvenile court found the following allegations to be true: (1) Boyfriend's substance abuse interfered with his ability to provide adequate care for M.N. (§ 300, subd. (b)); (2) Mother's substance abuse interfered with her ability to provide adequate care for M.N. (§ 300, subd. (b)); (3) M.N.'s sibling, K.C., was removed from Mother's care, and thus M.N. was at risk of similar neglect (§ 300, subd. (b)); (4) Boyfriend failed to protect K.C., M.N.'s sibling, and thus M.N. was at risk of similar neglect (§ 300, subd. (b)); and (5) Mother and Boyfriend failed to protect M.N.'s sibling, K.C., which places M.N. at risk of similar harm (§ 300, subd. (j)). The court ordered a minimum of two supervised visits per week between Mother and M.N.

D. SIX-MONTH, 12-MONTH, AND 18-MONTH REVIEWS

M.N. was placed in the same home as K.C. M.N. and K.C. (collectively, the children) bonded with one another, as well as Aunt and Uncle. The children referred to Aunt and Uncle as "mama and daddy or sometimes papa." M.N. did not "care too much" for Mother's visits. M.N. was angry after the visits and would bite Mother and strike Aunt and Uncle.

Mother began outpatient drug treatment in April 2008. The drug treatment program reported that on April 7, Mother tested positive for methamphetamine. On June 3, Mother again tested positive for methamphetamine. Between June 3 and late August, Mother's whereabouts were unknown to the Department. Mother missed visits with the children. Sometimes when Mother attended the visits she appeared to be under

the influence. During a visit on August 8, Mother and Boyfriend smelled of alcohol. Mother would often become frustrated with the children during visits.

In November 2008 Mother entered into an inpatient substance abuse treatment program. In January 2009 Mother was dismissed from her drug treatment program due to testing positive for alcohol. In March Mother entered another drug treatment program. Mother was asked to leave that program in April due to fighting.

On June 10, 2009, the juvenile court found Mother made minimal progress in resolving the problems that led to M.N.'s dependency. The court terminated Mother's reunification services in regard to M.N.; supervised visitation was ordered to occur once per week. On August 13, 2009, the juvenile court found Mother made minimal progress in resolving the issues that caused K.C.'s dependency. The court terminated reunification services. The court ordered supervised visitation once per week.

Mother's visits with the children were "sporadic." Mother visited twice in May, did not visit in June and July, visited once in August, and once in September. Due to the lack of frequent visits, M.N. was "less stressed" by the visits, and "not as angry." The children were "extremely attached" to Aunt and Uncle. The children continued to call Aunt and Uncle "'mommy and daddy,'" and would cry when separated from Aunt and Uncle.

E. GUARDIANSHIP

Aunt and Uncle were interested in adopting the children. However, Uncle was three years sober, and the Department required five years of sobriety for an adoptive parent. The Department recommended Aunt and Uncle be the children's legal

guardians. On December 30, 2009, the juvenile court appointed Aunt and Uncle as the children's legal guardians. The court ordered supervised visits between Mother and the children a minimum of once per month. The juvenile court terminated jurisdiction, relieved counsel, and dismissed the case.

F. REQUEST TO CHANGE A COURT ORDER

In May 2016, Mother filed a request to change a court order. (§ 388.) Mother asserted she was sober; had completed drug treatment, counseling, and parenting classes; and obtained housing. Mother requested the court issue orders for (1) regular visitation; (2) regular telephonic visitation; and (3) counseling sessions for Mother and the children. Mother asserted the changed orders would be in the children's best interests because "it is important for [the] children to have [a] relationship with [Mother]" and "it is also important that [the] children know the rest of their family." Mother attached various certificates to her request, such as certificates from drug treatment obtained in 2015 and 2016.

The Department opposed Mother's request. M.N. was 10 years old. K.C. was eight years old. A Department social worker spoke to the children. The children "stated they want no visits with their mother at all at this time. [M.N.] was very strong in his wording regarding any contact with his mother. The children shared at this time they do not want any phone calls or counseling with their mother. . . . The children report that their lives are stable and happy and that they feel forced visits with mother would be too much. [M.N.] reported he knows that if he ever wants to see his mother

he could ask [Uncle] and he would set up visitation for him." The children were fearful that the social worker wanted to remove the children from Uncle's care.

Mother told the Department social worker that she knows the children are happy with Uncle, "but she just feels like the children should know their mother." Mother explained that "she messed up in the past with her children and did not put them first but now that she is clean and sober she wants to have a connection with her children."

Uncle told the Department social worker that, after the guardianship was granted, he scheduled monthly visits between Mother and the children. However, Mother came to the visits intoxicated and with male friends who were also intoxicated. The children cried after the visits. Uncle believed the visits were detrimental to the children and stopped scheduling them. Uncle believed forced visits would be detrimental to the children, and said he would schedule a visit if the children asked to see Mother. Uncle had seen Mother in April 2016 and she did not ask about visiting the children.

The Department argued to the juvenile court that visits between Mother and the children would be detrimental to the children. The Department explained that the children "have no bond or connection" with Mother, and are choosing not to visit with her. The Department also pointed to evidence of the children being scared of being removed from Uncle's home. The Department argued that the children were "not . . . open or ready to resume a relationship with the mother."

On June 6, 2016, the juvenile court held a hearing on Mother's request—the hearing was for making a further prima facie case. At the hearing, Mother's attorney explained that Mother filed the written request herself. The attorney said Mother was

requesting to have the court enforce the monthly visits it ordered in 2009. Mother also wanted reunification services to be reinstated.

The children's attorney requested the court not order the children to participate in visits with Mother. Mother's attorney requested a contested hearing be scheduled so the children could be present for questioning; Mother asserted the children had been coached by Uncle.

The Department argued a contested hearing was not needed because Mother failed to establish the requested change was in the children's best interests. The children's attorney argued the children's desire not to visit Mother was due to Mother coming to visits intoxicated—not due to coaching by Uncle. Mother's attorney asked for an evidentiary hearing so she could show how Mother had "turned her life around."

The court found the best interests prong of the section 388 analysis "is not met at all." The court agreed Mother had changed, but there was no prima facie showing that the requested court orders would be in the children's best interests. The following exchange then occurred:

"[The Court]: However I will reiterate this. There is a Court order for visits. I'm not changing that order. It is in full force and effect from 2009, and that Court order says minimum once a month supervised visits by the legal guardians, so that order is in full force and effect. That's not being changed. Okay.

"[Children's Attorney]: Standard order where the children will not be forced to visit?

"[The Court]: Of course. All right. Thank you."

DISCUSSION

A. SUMMARY DENIAL

Mother contends the juvenile court erred by summarily denying her request because her request met the statutory requirements (§ 388).

Under section 388, a parent may petition a juvenile court to modify a previous order on the grounds of changed circumstances. (§ 388; *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) The petitioner has the burden to show, by a preponderance of the evidence, a change of circumstances, and to show that the proposed modification is in the child's best interests. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; Cal. Rules of Court, rule 5.570(h)(1).)

"[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "We review the grant or denial of a petition for modification under section 388 for an abuse of discretion." (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1228.)

Mother requested the court issue orders for (1) regular visitation; (2) regular telephonic visitation; and (3) counseling sessions for Mother and the children. Mother asserted the changed orders would be in the children's best interests because "it is important for [the] children to have [a] relationship with [Mother]" and "it is . . .

important that [the] children know the rest of their family." Mother attached various certificates to her request, such as drug treatment obtained in 2015 and 2016.

Mother told the Department social worker that she knows the children are happy with Uncle, "but she just feels like the children should know their mother." Mother explained that "she messed up in the past with her children and did not put them first but now that she is clean and sober she wants to have a connection with her children."

Mother never explained how the requested changes would be in the children's best interests. Rather, Mother explained the requested changes were important to her. Mother focused on why she felt the changes mattered, why she felt the changes were important, and what she wanted—a relationship with her children. Mother did not explain anything about the children and why the changes would benefit the children. Mother only explained why her requests were important to her. As a result, the juvenile's court decision to deny the request was reasonable because Mother failed to meet her burden of showing the proposed modifications were in the children's best interests.

Mother contends the juvenile court erred by denying her petition because the petition established that "[Mother] wanted to renew her relationship with her children and have her children enjoy a relationship with other family members as well." This is precisely the problem with Mother's request—it focuses on what Mother wants; Mother wants the children to have certain relationships. Mother fails to explain how the modifications will benefit the children. Accordingly, we find Mother's argument to be unpersuasive.

Mother contends the de novo standard of review should be applied to the summary denial of her request. If we applied the de novo standard of review, the result would be the same. Mother failed to explain how the requested modifications would be in the children's best interests. Mother only explained why the changes were important to her. Because Mother failed to meet her burden of showing the proposed modifications were in the children's best interests, we conclude—applying a de novo standard—that the juvenile court did not err.

Mother contends it was not established that the children would suffer a detriment due to the visits, and therefore the juvenile court erred. Mother cites the rule requiring a juvenile court to order visitation, when appointing legal guardians, unless the visitation would be detrimental to the children. (§ 366.26., subd. (c)(4)(C).) In 2009, when the juvenile court appointed Aunt and Uncle as legal guardians, it ordered visitation for Mother. The standard for a modification of a court order under section 388 is that the requested "change is in the best interests of the child[ren]." (§ 388, subd. (a)(2).) The proceeding to change a court order (§ 388) is a different proceeding, and has a different standard, than a proceeding to appoint legal guardians (§ 366.26, subd. (c)(4)(C)). As a result, Mother's detriment argument is unpersuasive because the detriment standard is relevant to the proceeding that occurred in 2009.

B. DUE PROCESS

Mother contends the juvenile court violated her right of due process by summarily denying her request to change a court order (§ 388). Contrary to Mother's position, the summary denial of deficient section 388 request does not violate due

process. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891; *In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461.) As explained *ante*, Mother's request to change a court order was deficient because she did not meet her burden of showing how the requested changes would be in the children's best interests. Therefore, we conclude the juvenile court did not violate Mother's right of due process.

C. DELEGATION OF AUTHORITY

Mother contends the juvenile court impermissibly delegated its decision making authority to the children when it said the children will not be forced to visit Mother.

When a court authorizes a parent to visit with a child, the court cannot then accord the child the discretion to refuse all visitation. An order which effectively grants a child the power to veto all visits is tantamount to a denial of visitation. (*In re S.H.* (2003) 111 Cal.App.4th 310, 319.)

The visitation orders in this case were made in 2009. The visitation orders provide, "Visitation between the child and mother shall be a minimum of one time per month supervised by legal guardians." Contrary to Mother's position, the visitation orders mandate that at least one visit per month occur. There is no language in the order delegating discretion to the children.

Mother focuses on the juvenile court's comment at the 2016 hearing, wherein the court said the 2009 order was a standard visitation order and the children would not be forced to visit. We cannot reverse a six-year-old judgment based upon a comment made

years after the judgment was entered. The language Mother is disputing is not in the court's order—it occurred years after the order was entered.

Mother asserts the clerk's transcript failed to include the condition that the children not be forced to visit Mother. Mother asserts the conflict between the clerk's transcript and the reporter's transcript should be resolved in favor of the reporter's transcript, which contains the language about not forcing the children to visit Mother. There is no conflict in the transcripts. The juvenile court, in 2016, did not create a new order nor add a condition to the 2009 order. The juvenile court expressly said, in regard to the 2009 visitation order, "That's not being changed." The juvenile court entered a visitation order in 2009. The court commented on that order in 2016. Both events occurred and were accurately recorded. There is no need to resolve a discrepancy in the transcripts.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.